No. 08-499

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

CUBA SOIL AND WATER CONSERVATION DISTRICT and LEA SOIL AND WATER CONSERVATION DISTRICT,

Petitioners,

v.

JAMES LEWIS, TREASURER, STATE OF NEW MEXICO and STATE OF NEW MEXICO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 30 U.S.C. § 191 of the Federal Mineral Leasing Act imply a private cause of action and remedy to political subdivisions, such as Petitioners, who dispute the amount of funding they or other state agencies or political subdivisions are receiving as directed by the state legislature?

LIST OF PARTIES

The Cuba Soil and Water Conservation District and the Lea Soil and Water Conservation District are political subdivisions of the State of New Mexico.

Respondent James Lewis is the Treasurer for the State of New Mexico and receives royalty payment funds pursuant to 30 U.S.C. § 191 and Respondent State of New Mexico is a sovereign state of the United States.

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OTHER JURISDICTIONS:

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OPINIONS BELOW

Respondents join in the Petitioners' statement of the citations of the opinions below.

JURISDICTION

Respondents join in the Petitioners' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents join in the Petitioners' statement of the constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

The Petitioners filed their action against the Respondents in the United States District Court for the District of New Mexico seeking declaratory relief and an injunction against the distribution of funds by the Respondents that had been provided pursuant to 30 U.S.C. § 191 ("§ 191"), of the Federal Mineral Leasing Act ("MLA") until the New Mexico legislature enacted legislation, which in the judgment of the Court, satisfied the "priority" provision of § 191. First Amended Complaint, Petitioners' Appendix filed with

the United States Court of Appeals for the Tenth Circuit. ("Aplt. App."), p. 16.

The relevant portion of § 191 provides that fifty percent of the sales, bonuses and royalties collected by the federal government from oil, gas and mineral developers for production in a given State shall be paid to that State:

> . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service.

The Petitioners claim that the uses for the funds under this provision include:

> libraries and recreation centers . . . secondary, community and university level education resources. . . . In addition, . . . training necessary to expand their poor rural economies. First Amended Complaint, Aplt. App. p. 13.

Pursuant to the MLA the New Mexico state legislature has directed the uses for these monies be accomplished in a variety of ways many of which are consistent with the uses described in § 191 and as alleged by the Petitioners. During the relevant time period New Mexico has enacted NMSA § 22-8-34(A), as amended 2001, that provides:

> Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology, and except as provided in Subsection B of this section, all other money received by the state pursuant to the provisions of the Federal Mineral Leasing Act, 30 USCA 181, et seq., shall be distributed to the public school fund.[1]

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[1] The first appropriation is to the instructional material fund whose uses include textbooks and other educational media that are used as the basis for instruction, NMSA § 22-15-2C; those eligible for the free use of these materials include all students in public schools, state institutions and private schools approved by the state board in all grades from first through twelve and any student in an adult basic education program approved by the Commission on Higher Education, NMSA § 22-15-7 and each of the above educational institutions may select the appropriate instructional materials for its students from a multiple list provided by the Department of Education and has the discretion to spend up to fifty percent of their allocations for instructional materials not on the multiple list, NMSA § 22-15-8B and C.

The next appropriation is to the Bureau of Geology and Mineral Resources of the New Mexico Institute of Mining and Technology whose purposes include collect, compile and publish information relative to New Mexico mining; map and study the geological formations of the state with special reference to their economic mineral resources; study the mining carried on in the state with special reference to their improvement; prepare and publish bulletins and reports of the natural resources and geology, mines and mineral deposits; assist in the education of miners, industries and the general public; consider such other scientific and economic problems and questions that are deemed of value to the people of New Mexico and coordinate with the

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Petitioners erroneously rely here on the affidavits submitted to the trial court in support of their motion for a preliminary injunction. Not only are they irrelevant to the issue of whether there is a private

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Mining and Minerals Division and the Secretary of Energy, Minerals and Natural Resources in the formulation of overall policy in the area of mining and minerals, NMSA § 69-1-2.

The remainder of the funds is to be distributed to the public school fund. This fund is distributed to public schools and state-charter schools in three parts: state equalization guarantee distribution, transportation distribution and supplemental distributions, NMSA § 22-8-14B. The equalization distribution is "program cost" that includes the following uses: early childhood education, basic education, special education, bilingual multicultural education, size adjustment and at-risk program. NMSA § 22-8-18 *et seq.* An example of a specific use in the size adjustment is for schools with less than 400 students. NMSA § 22-8-23.

The transportation distribution enables school districts to purchase school buses that include the express uses for developmentally disabled three and four year old children and for students where vocational education programs are offered, NMSA § 22-8-26, and also enables schools to purchase additional buses for special needs, NMSA § 22-8-27B.

The supplemental distribution includes emergency distributions to school districts in financial need for program enrichment that cannot be otherwise financed that includes uses such as special vocational education at area vocational schools and for emergency capital outlays demanding immediate attention, NMSA § 22-8-30.

Finally, the public school fund statute provides that it is the responsibility of the local school board to determine priorities in terms of the needs of the community it serves. The funds available under this fund are discretionary as to each school district provided that the enumerated special programs in the section are met. NMSA § 22-8-18B.

cause of action or remedy under the MLA but also the trial court in rendering its decision did not rely upon them.[2]

SUMMARY OF ARGUMENT

The lower courts held that the Petitioners have neither an implied private cause of action nor a remedy for any of their claims under the MLA. The fundamental premise of these claims is that the Petitioners disagree with the appropriations made by the New Mexico legislature of the funds received under the MLA and they should receive more of these funds and other state agencies and political subdivisions should receive less.

While Petitioners have gone to considerable lengths to convince the Courts below, and again here, of the merits of their claims, they have failed to satisfy the substantial controlling precedent that there is no private cause of action nor a remedy for such claims under the MLA. Petitioners overly rely on the Court of Appeals' statement that the issue of

[2] United States District Court for the District of New Mexico, Memorandum Opinion and Order, August 28, 2007, footnote 1 noted that only the reply brief of Petitioners relating to the preliminary injunction and the two surreplies were utilized. Appendix p. 11. The affidavits relied upon here were attached only to the Petitioners' Memorandum in Support of the Motion for Preliminary Injunction and, therefore, were not considered by the trial court. Aplt. App. pp. 160-175.

whether there is a private cause of action or remedy under the MLA is "one of first impression." It is clear the controlling precedent and principles determinative of this issue and relied upon by the Courts below are not of first impression.

The Petitioners have the burden of showing the MLA expresses Congressional intent to create a private right of action and a private remedy. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The sole basis upon which a private right of action can be inferred is Congressional intent. *Id.* The Courts below relied upon *Alexander* for the principle that without such intent, a cause of action does not exist and courts will not create one. *Id.* at 286-287.

Cannon v. Univ. of Chicago, 441 U.S. 677, 690, n. 13 (1979) held that to determine Congressional intent the statute must be examined for "rights-creating language" and there must be an explicit conferring of a right directly on a class of persons that includes the plaintiff and identifies the class for whose special benefit the statute was enacted. The MLA is silent in terms of any rights-creating language for political subdivisions.

Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 772-773 (1981) held there was no private remedy in Section 1 of the Davis-Bacon Act where it was required that provisions be placed in federal construction contracts for the benefit of laborers. This did not create private rights for these individuals because it was only phrased as a "directive to federal

agencies engaged in the disbursement of public funds." *Id.* at 772-773. The same is true here as the "priority" of § 191 is at best only a directive to each state legislature as a part of its discretionary directing of the uses for the MLA monies.

The Court has determined that there must be an analysis of "the relation between the specific provision at issue and the related statutory scheme" as a part of determining whether a private right of action exists which has been interpreted to mean an examination of the text and structure of the statute. *Alexander* at 288. The MLA's enforcement provision is found in 30 U.S.C. § 195. It only provides for enforcement by the United States Attorney General and the States through civil actions. There is no provision for enforcement by government subdivisions.

While the Petitioners have relied upon some legislative history for the merits of their claims, the legislative history relevant to whether there is a cause of action or a remedy for such claims establishes there is none. This history demonstrates that Congress was aware of possible tension between States and their subdivisions regarding the apportionment of MLA funds and that it was also aware of the lack of any enforcement scheme for such disputes. Yet Congress to this date has not provided political subdivisions, such as the Petitioners, with any form of enforcement rights of action or remedies under the MLA.

The sanctioned ability of thousands of subdivisions in all of the MLA recipient States to institute court claims for legal remedies based on disagreement with the distribution of MLA funds by state legislatures was never intended by Congress.

ARGUMENT

A. The 1976 Mineral Leasing Act, 30 USC § 191, Provides Funds To Be Used By Each Included State And Its Subdivisions As The State Legislature Directs

The specific provision of the MLA in dispute is § 191. It provides in relevant part that fifty (50) percent of the sales, bonuses and royalties collected by the federal government from oil, gas and mineral developers for production in a given State shall be paid to that State:

> . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service.

In analyzing this text it is clear that as a part of the States receiving the MLA funds from mineral development in each involved state Congress intended that the state legislature had the discretion

and final authority to determine the uses for these funds. In addition, the MLA is silent as to how each State legislature decides which state agencies and/or subdivisions are to implement the uses of the MLA funds as directed by the legislature.[3]

B. The "Priority" Provision Of 30 USC § 191 Describes Some Alternative Uses For The MLA Funds Received By The State And New Mexico Has Complied

30 USC § 191 provides that as a part of each State legislature directing the uses and methods of implementation it is to give "priority" to "subdivisions that are socially or economically impacted by the development of minerals" pursuant to the MLA. Congress left to each State legislature to determine the nature and extent of "socially or economically impacted." There is a broad range of services and materials that can address social and economic impacts. Again, Congress left it up to each State

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[3] Each state legislature has the unique knowledge regarding the experience, capability and structure of its political subdivisions to decide which of them can most effectively utilize the MLA funds including "priority" subdivisions in terms of the § 191 uses that include planning, public facilities and public service. For example, a state legislature may know that an impacted area under § 191 needs additional education, vocational and health facilities and services. The legislative decision may be a variety of existing educational, vocational and health institutions are more educated, experienced and better staffed than other subdivisions, such as Petitioners, to accomplish these purposes and make the best use of the MLA funds.

legislature to interpret both the meanings and methods to address these matters.

The New Mexico state legislature has complied with the provisions of § 191.[4] The New Mexico legislative framework for identifying the uses of the MLA funds together with the methods of implementation is found in NMSA § 22-8-34. In summary, the New Mexico legislature has directed that appropriations of the MLA funds be made to the instructional material fund, the New Mexico Institute of Mining and Technology and to the public school fund. In turn there are specific statutes governing the uses of these three major appropriations (See pp. 2-3 and footnote 1 above and Aplt. App. pp. 30-35).

Many of these dedicated uses include the three uses described in § 191, planning, construction and maintenance of public facilities and provision of public service. These dedicated uses are also the same as the uses identified by the Petitioners including libraries and recreation centers, secondary, community and university level education resources and training necessary to expand their poor rural economies.

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[4] Petitioners have claimed in several places in their Petition that New Mexico admits the funds are not being used for § 191 purposes. While not determinative of the private cause of action or remedy issue, the Respondents have consistently informed the Courts below that many of the purposes of § 191 and as alleged by Petitioners have been served.

Therefore, on the face of the New Mexico legislative scheme both the priority and the uses of § 191 have been fulfilled.

C. The MLA Provides Neither An Express Or Implied Private Right Of Action Nor A Private Remedy

Should it be assumed that the New Mexico legislature has not complied with § 191, the Petitioners' claims fail because they have no private right of action or remedy under the MLA. The Petitioners' real remedy lies with the New Mexico legislature in seeking a change to the legislative scheme of directing the appropriations of the MLA funds.

The Petitioners acknowledge they do not have an express right of a private action or a remedy but assert they have an implied right of action and remedy. The starting point under recent judicial precedent for determining if such an implied right exists is the decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Court provided several fundamental standards to be applied including:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. (Citations omitted).
>
> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. (Citations omitted). Statutory intent on this latter point

> is determinative. (Citations omitted). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. (Citations omitted).
>
> Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals. *Id.* at 286-287.

Petitioners have consistently focused on the merits of their claims in the apparent hope that a court will ignore the Court's admonition not to create a cause of action nor a remedy no matter how desirable that may be as a matter of policy or how compatible with the MLA.[5]

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[5] Petitioners rely on *Lawrence County v. Deadwood School District*, 469 U.S. 256 (1984) to support the granting of their Petition. Petition, pp. 6-8. *Lawrence County* did not involve any consideration of whether a private cause of action existed under the federal statute involved. Petitioners rely only upon the merits of the Supremacy Clause determination. While not relevant to the issue here, that determination is readily distinguished. The Payment in Lieu of Taxes Act, 31 U.S.C. § 6902 ("Act"), provided in relevant part the Secretary of the Interior make annual payments "to each unit of general local government in which entitlement land is located." (Such units were defined elsewhere in the Act to include counties, townships and cities.) The Act also provided that "A unit may use the payment for any governmental purpose." The Act, unlike § 191, provided a direct payment to political subdivisions to use in their discretion that the Court found could not be abridged under the Supremacy Clause by South Dakota's statute that limited such

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Alexander held the method to determine Congressional intent was to examine the statute for "rights-creating" language which "explicitly confers a right directly on a class of persons that includes the plaintiff (internal quotation marks omitted) (citations omitted) and language identifying the class for whose especial benefit the statute was created." (Internal quotation marks omitted) (citations omitted). "We also consider the relation between the specific provision at issue and the related statutory scheme." *Id.* 532 U.S. 275, 288.[6]

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discretion to a formula based on the distribution of general tax revenues.

[6] Petitioners miss the point of the Court of Appeals' analysis that includes the Tenth Amendment. Petition pp. 10-25. The Court below noted that under either private cause of action or Eleventh Amendment analysis "[B]oth inquiries turn upon congressional intent." (citation omitted) Appendix p. 9. This was in the context of concern about interpreting and enforcing the "imprecise standard" of "giving priority" under § 191. *Id.* at 7. The Court below noted that an "array of legislative decisions might constitute 'giving priority' . . . " *Id.* at 8. The Court of Appeals under this circumstance expressed reluctance to intrude upon State sovereignty under the Tenth Amendment. *Id.* at 7-8. Finally, noting that Congress cannot require a state legislature to enact a particular kind of law. *Id.* at 8. Simply put, the Court below as a part of finding no private cause of action under § 191, held that Congress cannot force state legislatures to enact legislation when it has not clearly defined essential terms (here "giving priority") and the judiciary cannot reasonably provide or enforce relief under such circumstances.

D. Congress Did Not Include Any "Rights Creating Language" For The Petitioners In The MLA

The MLA fails to identify any "rights-creating language" as to the Petitioners nor are they one of the class for whose special benefit, that implies a right, for whom the statute was created.

In resolving the special benefit issue in the context of the distribution of public funds *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981) declined to find a private right of action under the Davis-Bacon Act that required certain stipulations be included in federal construction contracts for the benefit of mechanics and laborers. In relying on *Cannon* the Court held the benefiting language was only "phrased as a directive to federal agencies engaged in the disbursement of public funds." 450 U.S., 772. The language of § 191 authorizes each State legislature to direct the use of the MLA funds for the benefit of each state and at most is a directive that includes a priority for certain subdivisions among all of the State's subdivisions. No right has been created.

The Petitioners attempt to create a right of action through reference to a statement in *Cannon* that the Supreme Court has "never withheld a private remedy where the statute explicitly confers a benefit on a class of persons . . . " Petition, pp. 30-31. Petitioners erroneously assume such a benefit and their own class when in fact the priority relied upon is at best a directive for the distribution of public

funds that does not create a special benefit or a class for them and, therefore, does not imply a private right of action.

Cannon describes the various rights-creating statutes that contained a right for a class in which a claimant was a member. *Id.* 441 U.S. 677, 689-693 and nn. 10, 12 and 13. These included the federal statute covering any employee of a railroad and the requirement of hand holds, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916); the language of the Voting Rights Act of 1965 that "no person shall be denied the right to vote" for failure to comply with certain state statutory provisions, *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and "employees shall have the right to organize and bargain collectively through representatives . . . " *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). These provisions are in clear contrast to § 191 that contains no express granting of rights nor prohibitions of denying any rights to the Petitioners.

E. The Relation Between § 191 And The MLA Statutory Scheme Demonstrates No Intent To Create A Private Right Of Action Nor A Remedy

The second factor in *Alexander* for determining whether a private right of action was implied is the relation between the specific provision at issue and the related statutory scheme. *Id.* 532 U.S. 275, 288.

The MLA's enforcement provisions are found in 30 U.S.C. § 195 and do not include any right to a private right of action nor a remedy by any state subdivision or citizen. The only parties with the right of civil enforcement action under the MLA are the United States Attorney General and the States. *Id.* at § 195(c) and (d). First, it is apparent that Congress explicitly only provided a right of enforcement action under the MLA to the United States Attorney General and to the States.

Second, by doing so, Congress intended that no other parties had any right of action or remedy. The Court of Appeals below relied on *Alexander* for the principle:

> The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. Appendix p. 6.

Petitioners acknowledge the 1987 amendment to the MLA "on its face" did not provide them with any ability to bring an enforcement action. Petition, pp. 31-32. However, again Petitioners assert without merit the "directive" in § 191 implies a right of action. Petition pp. 31-34.

As demonstrated below the legislative history establishes that Congress was aware of both the possible conflict between subdivisions and States regarding the funds under § 191 and the lack of any enforcement provisions for the subdivisions yet has decided over a thirty-year period to provide no right

of private action or remedy for such subdivisions either by statute or administrative regulation but rather only to the U.S. Attorney General and the States.

No private right of action for a subdivision was found under § 191 in *Nye County, Nevada v. Krolicki*, No. CV-N-99-388 (D. Nev. March 29, 2000) (Supplemental Appendix, United States Court of Appeals for the Tenth Circuit ("Supp. App.") pp. 200-210). The identical claims in the present action were presented in that case. (The Respondents believe this is the only other decision resolving whether there is a private cause of action or remedy under § 191).

The Court in *Nye County* determined from the pleadings that forty percent of the mineral royalties paid to the United States under § 191 were generated in Nye County but less than two percent of the funds distributed by the Nevada legislature went to Nye County. The Court also found that all of the MLA funds received by the State of Nevada under § 191 were deposited in the state distributive school account in the state's general fund and distributed on a per pupil basis.

The *Nye County* Court reviewed the MLA enforcement provisions in § 195 noting that only the U.S. Attorney General and the States had such powers and concluded: "However, the statute is silent as to private causes of action against a state." (Supp. App., p. 205).

F. The MLA Legislative History Does Not Establish An Intent By Congress To Imply A Private Right Of Action But Rather Excludes It

The legislative history of the MLA relied upon by the Petitioners and § 191 in particular, the essence of which is over a now more than thirty-year period, Congress intended to expand the uses of the MLA funds beyond roads and schools but not exclude those uses and provide at most a directive to each involved State legislature as to a priority for the possible uses of some of these funds. It recognized the possibility of tensions and disputes between the States and subdivisions regarding the uses for the MLA funds but left the decision as to the uses and appropriations of the funds together with the methods of implementation to the direction of each State legislature. However, Congress did not amend the MLA or its administrative procedures to provide for any private right action or remedy for subdivisions under § 191 even though there was a recognition of the lack of any such right of enforcement.[7]

Petitioners assert legislative history provides the necessary basis to conclude that Congress intended to imply that the subdivisions have a private right of action and remedy under § 191. To the contrary, this history establishes the clear lack of any intent by

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[7] Aplt. App. pp. 101-102, 104-106 (Arnold E. Petty, Deputy Director for Services, Bureau of Land Management); Petition, pp. 18-19.

Congress to imply any such private right or remedy. Not only did Congress not provide any private right or remedy when it expanded the scope of uses for § 191 funds but most importantly was aware of the possibility of disputes between subdivisions and States concerning such funds and the lack of any related enforcement rights for subdivisions, yet to this day has not provided any private right of action or remedy for them.

CONCLUSION

For all the foregoing reasons discussed herein, the Petition for Writ of Certiorari should be denied.

November 17, 2008

Respectfully submitted,

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